

SENATE BILL NO. 88

101ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR WIELAND.

0087S.01I

ADRIANE D. CROUSE, Secretary

AN ACT

To amend supreme court rules 25.02, 25.03, 25.04, 25.05, 25.08, 25.10, 25.12, 25.14, 25.18, and 25.19, and to annul rule 25.15, relating to discovery in criminal cases.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Supreme court rules 25.02, 25.03, 25.04, 25.05, 25.08, 25.10, 25.12, 25.14, 25.18, and 25.19, are amended, and supreme court rule 25.15 is annulled, to read as follows:

25.02. Misdemeanors or Felonies - Time for Discovery

(a) Disclosure [on filing of felony complaint.

Requests or motions for discovery of material and information as provided in Rule 25.03(a) may be made any time after defendant's initial appearance in court. The state shall, within fourteen days of service of defendant's request, provide to defendant's counsel material and information as provided in Rule 25.03(a). The court may enlarge or shorten the time for the state to respond to the request.

(b) Disclosure after indictment or filing of information. Except as provided in paragraph (a), upon the filing of an indictment or information discovery may commence. Requests or motions for discovery may be made after the filing of the indictment or information. Requests or motions for discovery shall be made not later than twenty days after arraignment. Requests or motions for discovery shall be answered within fourteen days after service of the

EXPLANATION-Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

19 request. The court may enlarge or shorten the times
20 specified in this rule] **after arraignment. Discovery as**
21 **provided herein shall not commence earlier than arraignment**
22 **of the defendant. Unless otherwise provided, responses to**
23 **discovery requests shall be made within fifteen days of the**
24 **service of the request or not less than ten days prior to**
25 **trial, whichever is earlier. The time for response may be**
26 **extended by the court for good cause shown, but no more than**
27 **one extension of time shall be granted without prior notice**
28 **to the opposing party.**

29 (b) **Objections, if any, to discovery requests shall be**
30 **filed and served within the time for responding to such**
31 **requests.**

25.03. Misdemeanors or Felonies - Disclosure by State
2 to Defendant Without Court Order

3 (a) Disclosure [upon filing of felony complaint] **after**
4 **arraignment.** Except as otherwise provided in these Rules,
5 the state shall, upon written request of defendant's
6 counsel, **or of defendant if counsel has been waived,**
7 disclose to [defendant's counsel] **defendant** the following
8 material and information [in the possession of the
9 prosecutor: any arrest reports, incident reports,
10 investigative reports, written or recorded statements,
11 documents, photographs, video, electronic communications and
12 electronic data that relate to the offense for which
13 defendant is charged.

14 (b) Disclosure after indictment or filing of
15 information. Except as otherwise provided in these Rules,
16 the state shall, upon written request of defendant's
17 counsel, disclose to defendant's counsel the following
18 material and information] within its possession or control
19 designated in the request:

20 (1) Any arrest reports, incident reports,
21 investigative reports, written or recorded statements,
22 documents, photographs, video, electronic communications and
23 electronic data that relate to the offense for which
24 defendant is charged;

25 (2) The names [and last known addresses] of persons
26 whom the state intends to call as witnesses at any hearing
27 or at the trial, together with their written or recorded
28 statements, and existing memoranda, reporting or summarizing
29 part or all of their oral statements; **provided, that if no**
30 **written or recorded statements or memoranda reporting or**
31 **summarizing oral statements are in existence, the state**
32 **shall provide a brief synopsis of the expected trial**
33 **testimony of such persons;**

34 (3) Any written or recorded statements and the
35 substance of any oral statements made by defendant, a co-
36 defendant or a co-actor, a list of all witnesses to the
37 making of the statements and a list of all witnesses to the
38 acknowledgment of the statements [including the last known
39 addresses of the witnesses];

40 (4) Those portions of any existing transcript of grand
41 jury proceedings that relate to the offense with which
42 defendant is charged, containing testimony of defendant and
43 testimony of persons whom the state intends to call as
44 witnesses at a hearing or trial;

45 (5) Any existing transcript of the preliminary hearing
46 and of any prior trial held in defendant's case if the state
47 has the transcript in its possession;

48 (6) Any reports or statements of experts made in
49 connection with the particular case, including results of
50 physical or mental examinations and of scientific tests,
51 experiments, or comparisons;

52 (7) Any books, papers, documents, photographs, video,
53 electronic communications, electronic data, or objects that
54 the state intends to introduce into evidence at the hearing
55 or trial or that were obtained from or belong to defendant;

56 (8) Any record of prior criminal convictions of
57 persons the state intends to call as witnesses at a hearing
58 or the trial; and

59 (9) Any photographic or electronic surveillance
60 (including wiretapping) of defendant or of conversations to
61 which defendant was a party or of defendant's premises,
62 relating to the offense charged. This disclosure shall be
63 in the form of a written statement by counsel for the state
64 briefly setting out the facts pertaining to the time, place,
65 and persons making the photographic or electronic
66 surveillance.

67 [(c)] **(b)** The request provided for by this Rule shall
68 be made by filing the request in the court where the case is
69 pending and serving a copy of the request upon counsel for
70 the state.

71 [(d)] **(c)** The state may redact from any document it
72 provides to defendant's counsel [the following information:
73 taxpayer identification number, the first five digits of a
74 social security number, driver's license number, financial
75 account number, personal identification code (PIN),
76 electronic password of a victim or witness, or the actual
77 address or mailing address of a participant in an address
78 confidentiality program administered by the Missouri
79 Secretary of State,] but must do so in a manner that makes
80 it clear that the information has been redacted.

81 [(e)] The state may elect to provide a separate copy of
82 a redacted document to defendant's counsel to be delivered
83 to defendant and designated as "Defendant's Copy." If the

84 state provides a redacted document designated as
85 "Defendant's Copy," in addition to the information permitted
86 to be redacted pursuant to Rule 25.03(d), the state may also
87 redact from "Defendant's Copy" of the document the following
88 information: date of birth, home address, work address, and
89 personal phone number and work phone number of a victim or
90 witness. However, the redaction must be done in a manner
91 that makes it clear the information has been redacted from
92 the document. Defendant's counsel shall be provided a
93 separate document designated as "Lawyer Copy Only - Not for
94 Defendant" that includes the information that has been
95 redacted from the document pursuant to Rule 25.03(e). If
96 defendant's counsel is provided with a redacted document by
97 the state designated as "Defendant's Copy," only that copy
98 shall be provided to defendant. Defendant's counsel shall
99 not provide to defendant the unredacted document or any
100 information redacted from the document pursuant to this Rule
101 without court approval. For any document designated
102 "Defendant's Copy" or "Lawyer Copy Only - Not for
103 Defendant," every page of the respective document shall be
104 so designated.

105 (f) Defendant is not entitled to the information
106 redacted from a document as provided in Rule 25.03(d) or (e)
107 unless the court determines after a showing of good cause
108 that the disclosure of the information is necessary for the
109 defense of the case.

110 (g)] (d) The state shall, without written request,
111 disclose to defendant any material or information that tends
112 to negate the guilt of defendant for the charged offense,
113 mitigate the degree of the offense charged, reduce the
114 punishment of the offense charged, and any additional
115 material or information that would be required to be

116 disclosed to comply with [Brady v. Maryland, 373 U.S. 83
117 (1963), Giglio v. United States, 405 U.S. 150 (1972) and
118 their progeny] **the requirements of due process.**

119 [(h)] (e) If **otherwise discoverable** material or
120 information [would be discoverable under subsections (b) and
121 (g) of this Rule if in the possession or control of the
122 state] **is not in the possession or control of the**
123 **prosecutor**, but is in possession or control of other
124 governmental personnel, [the state shall use diligence and
125 make good faith efforts to make the material or information
126 available to defendant. If the state's efforts are
127 unsuccessful] **the prosecutor shall use diligence and make**
128 **good faith efforts to cooperate with the defense to make the**
129 **material or information available to the defendant. If the**
130 **parties' cooperative efforts are unsuccessful**, and the
131 material or information or other governmental personnel are
132 subject to the jurisdiction of the court, the court, upon
133 request, shall issue subpoenas or orders to cause the
134 material or information to be made available to the state
135 for disclosure to the defense.

25.04. Misdemeanors or Felonies - Disclosure by State
2 to Defendant by Court Order Requiring a Showing of Good Cause

3 (a) The defense may make a written motion in the court
4 having jurisdiction to try said case requesting the state to
5 disclose material and information not covered by Rule 25.03
6 **which is in the possession or control of the prosecuting**
7 **attorney.** Such motion shall specify the material or
8 information sought to be disclosed[. If the court finds the
9 request to be reasonable] **and state with particularity the**
10 **relevance and materiality of such material and information.**
11 **If the court finds the request to be reasonable and**
12 **necessary to ensure a fair trial**, the court shall order the

13 state to disclose to defendant that material and information
14 requested which is found by the court to be relevant and
15 material to defendant's case.

16 (b) The court shall specify the material and
17 information to be disclosed and the time and manner in which
18 the state shall make disclosure under this Rule.

19 (c) [If any material and information which the court
20 orders the state to disclose under this Rule is in the
21 possession or control of other governmental personnel, the
22 state shall use diligence and make good faith efforts to
23 cause such material to be made available to the defense; and
24 if the state's efforts are unsuccessful and such material or
25 other governmental personnel are subject to the jurisdiction
26 of the court issuing such order, said court, upon request,
27 shall issue suitable subpoenas or orders to cause such
28 material to be made available to the state for disclosure to
29 the defense] **Nothing in this rule shall be construed to
30 prevent the state or defendant from securing subpoenas duces
31 tecum to require the attendance of witnesses and the
32 production of material at trial.**

25.05. Misdemeanors or Felonies - Disclosure by
2 Defendant to State Without Court Order

3 (a) Except as otherwise provided in these Rules as to
4 protective orders, and subject to constitutional
5 limitations, on written request by the state, defendant
6 shall disclose to counsel for the state part or all of the
7 following material or information within defendant's
8 possession or control designated in such request:

9 (1) Any reports or statements of experts made in
10 connection with the particular case, including results of
11 physical or mental examinations and of scientific tests,
12 experiments, or comparisons, which the defense intends to

13 introduce into evidence at a hearing or trial, except that
14 those portions of any of the above containing statements
15 made by defendant shall not be disclosed;

16 (2) The names and last known addresses of persons,
17 other than defendant, whom defendant intends to call as
18 witnesses at any hearing or trial, together with their
19 written or recorded statements, and existing memoranda
20 reporting or summarizing part or all of their oral
21 statements; **provided, that if no written or recorded**
22 **statements or memoranda reporting or summarizing oral**
23 **statements are in existence, the defense shall provide a**
24 **brief synopsis of the expected trial testimony of such**
25 **witnesses (other than the defendant);**

26 (3) Those parts of any books, papers, documents,
27 photographs, video, electronic communications, electronic
28 data, or objects, except those that contain statements of
29 defendant, which defendant intends to introduce in evidence
30 at a hearing or trial;

31 (4) If defendant intends to rely on the defense of
32 mental disease or defect excluding responsibility, or to
33 claim that defendant has a mental disease or defect negating
34 a culpable mental state, disclosure of these defenses shall
35 be in the form of a written statement by counsel for
36 defendant; and

37 (5) If defendant intends to rely on the defense of
38 alibi and the state in its request specifies the place,
39 date, and time of the crime charged, disclosure shall be in
40 the form of a written statement by counsel for defendant,
41 announcing defendant's intent and giving specific
42 information as to the place at which defendant claims to
43 have been at the time of the alleged offense, and as
44 particularly as is known, the names and addresses, **and dates**

45 **of birth** of the witnesses by whom defendant proposes to
46 establish the alibi.

47 (b) The request provided for by this Rule shall be
48 made by filing the request in the court where the case is
49 pending and serving a copy of the request upon defendant or
50 defendant's attorney.

25.08. Misdemeanors or Felonies - Continuing Duty to
2 **[Disclosure] Disclose**

3 If after complying with a request for disclosure or
4 order of court, a party discovers information or material
5 that the party would have been required to disclose under
6 the request or order, the party shall furnish this
7 additional information or material to opposing counsel as
8 soon as practicable. If the additions are discovered during
9 trial, the court also shall be notified.

25.10. Misdemeanors of Felonies - Matters not Subject
2 to Disclosure

3 The following matters shall not be subject to
4 disclosure:

5 (a) Legal research, or records, correspondence,
6 reports, or memoranda to the extent that they contain the
7 opinions, theories, or conclusions of counsel for the state
8 or members of the state's legal or investigative staff, or
9 of defendant, defense counsel, or members of defendant's
10 legal or investigative staff, **including attorney notes**
11 **prepared for the purpose of presenting testimony of**
12 **identified witnesses at trial.**

13 (b) An informant's identity where informant's identity
14 is a prosecution secret, a failure to disclose will not
15 infringe the constitutional rights of defendant, and
16 disclosure is not essential to a fair determination of the
17 cause. Disclosure shall not be denied hereunder as to the

18 identity of an informant to be produced at a hearing or
19 trial.

20 (c) Any material or information which involves a
21 substantial risk of prejudice to national security, where a
22 failure to disclose will not infringe the constitutional
23 rights of the accused, and where disclosure is not essential
24 to a fair determination of the cause. Disclosure shall not
25 be denied hereunder as to material or information which is
26 to be disclosed at a hearing or trial.

25.12. Misdemeanors or Felonies - [Discovery

2 Deposition by Defendant] **Depositions** - When and How Taken

3 (a) In General. [A defendant in any criminal case
4 after an indictment or the filing of an information may
5 obtain the deposition of any person on oral examination or
6 written questions. The manner of taking the deposition
7 shall be governed by the rules relating to the taking of
8 depositions in civil actions] **Depositions shall be taken
9 only of expert witnesses and for purposes of preserving
10 testimony for trial.**

11 (b) Location of Deposition. Depositions of witnesses
12 shall be taken in the county where the witnesses live, or in
13 another location agreed upon by the parties, or at a
14 location designated by the court. The deposition of any
15 person confined in prison shall be taken where the person is
16 confined, unless otherwise ordered by the court.

17 (c) Presence of Defendant. Defendant shall not be
18 physically present at a [discovery] deposition except by
19 agreement of the parties or upon court order for good cause
20 shown. In addition, upon motion of the defense, the court
21 may order the physical presence of defendant upon a showing
22 [of good cause] **that the defendant's presence is
23 constitutionally required.**

24 [The court should consider:

25 (1) The need for the physical presence of defendant to
26 obtain effective discovery;

27 (2) The effect of defendant's presence on the witness;
28 and

29 (3) Any available use of screening or alternative
30 methods of taping or recording that would allow defendant
31 limited observation of the witness and the ability to confer
32 with counsel.]

33 (d) Experts. The [defense] **parties** may discover by
34 deposition the facts and opinions to which an expert is
35 expected to testify. Unless manifest injustice would result,
36 the court shall require that the party seeking discovery pay
37 the expert a reasonable hourly fee for the time the expert
38 is deposed; **provided, that in the case of indigency of a**
39 **defendant, the court may dispense with this requirement.**

25.14. Misdemeanors or Felonies - Depositions to
2 Preserve Testimony - When and How Taken

3 (a) A prosecuting attorney or defense attorney may
4 file a motion in a pending case to take the deposition of a
5 witness to preserve testimony. The motion shall not seek
6 the deposition of defendant or the spouse of defendant. The
7 court shall order the deposition if it finds, after a
8 hearing, that the deposition is necessary to preserve
9 testimony.

10 (b) The order shall require defendant to attend the
11 deposition or to personally waive the right to be present
12 and the right of confrontation in writing or in open court.
13 The order shall contain provisions necessary to fully
14 protect defendant's rights of personal confrontation and
15 cross-examination of the witness.

16 (c) The court shall direct that the deposition be
17 taken in the county where the offense occurred or at another
18 location designated by the court.

19 (d) A deposition taken pursuant to this Rule 25.14 may
20 be used by either party at trial, subject to Rules 25.13 and
21 25.16.

22 (e) The officer before whom the deposition is to be
23 taken shall have authority to issue a subpoena requiring the
24 attendance of the witness at the deposition in the same
25 manner as is provided with respect to the attendance of
26 witnesses at the trial of a criminal case.

27 (f) The reasonable personal and traveling expenses of
28 defendant and counsel shall be taxed as costs.

25.18. Misdemeanors or Felonies - Sanctions

2 (a) If at any time during the course of the proceeding
3 it is brought to the attention of the court that a party has
4 failed to comply with an applicable discovery rule or an
5 order issued regarding discovery, the court may order the
6 party to make disclosure of material and information not
7 previously disclosed, grant a continuance, exclude such
8 evidence, or enter an order it determines just under the
9 circumstances; **provided, that a victim's testimony shall not**
10 **be excluded as a discovery sanction.**

11 (b) Willful violation by counsel or defendant of an
12 applicable discovery rule or an order regarding discovery
13 may subject counsel or defendant to appropriate sanctions by
14 the court.

15 (c) **No motion for sanctions or to compel discovery**
16 **shall be heard unless the counsel for the moving party has**
17 **certified to the court that informal efforts to resolve the**
18 **dispute have occurred without success.**

25.19. Misdemeanors or Felonies - Investigations Not
To Be Impeded

[Except as may be provided by a protective order entered by the court, counsel for the parties, including employees or agents of counsel for the parties, shall not advise any individual who has relevant material or information to not discuss the case with opposing counsel or their employees or agents, and shall not otherwise impede opposing counsel's investigation of the case. This rule does not apply to defense counsel advising defendant not to discuss the case with others] **Unless otherwise ordered by the court for good cause shown, neither counsel nor any party, or their agents or employees, shall contact or communicate with identified witnesses for the opposing party except upon advance notice to counsel for the opposing party; provided, that nothing herein shall limit or prevent the state or its officers from conducting lawful investigations into any offenses or from continuing to conduct further investigation of any charged offense.**

[25.15. Misdemeanors or Felonies -
Discovery Depositions by State - When and How
Taken

(a) In General. A prosecuting attorney in any criminal case may obtain the deposition of any person on oral examination after an indictment or the filing of an information. The manner of taking the deposition shall be governed by the rules relating to the taking of depositions in civil actions.

(b) Location of Deposition. Depositions of witnesses shall be taken in the county where the witnesses live, or in a location that is agreed upon by the parties, or at a location designated by the court. The deposition of any person confined in prison shall be taken where the person is confined, unless otherwise ordered by the court.

(c) Presence of Defendant. Defendant shall not be physically present at a discovery deposition except by agreement of the parties or upon court order for good cause shown.

23 (d) Experts. The prosecution may discover
24 by deposition the facts and opinions to which an
25 expert is expected to testify. Unless manifest
26 injustice would result, the court shall require
27 that the party seeking discovery from an expert
28 pay the expert a reasonable hourly fee for the
29 time the expert is deposed.]

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